Petition

Supreme Court, U.S.
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81-1845

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No.

TERRY CURTIS BENSON,
Petitioner

-vs-

STATE OF WYOMING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

I) THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY RELATING TO THE NATURE OF PRETITIONER'S PRIOR FELONY CONVICTION.

II) THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT A NECCESSARY ELEMENT OF THE OFFENSE WAS THAT THE FIREARM BE OPERABLE.

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REPORTS BELOW

The opinion of the supreme Court of the State of Wyoming is reported as follows: Benson v State p 2d, No. 5538 (Wyo 1982).

The Judgment of the District Court of Laramie County (First Judicial District) Wyoming is not reported. The opinion of the Supreme Court of the State of Wyoming appears in the appendix attached hereto.

JURISDICTION

The Judgment of the Supreme Court of the State of Wyoming was entered on 5 February, 1982. There have been no petitions for rehearings filed. This Peition for Certiorari was filed within 60 days of that date. This Court Jurisdiction is envoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLED

AMENDMENT II, UNITED STATES CONSTITUTION

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT XIV, UNITED STATES CONSTITUTION

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privleges or immumties of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny any person withing it's jurisdiction the equal protection of the laws.

ARTICLE I, SECTION 37, WYOMING CONSTITUTION

The State of Wyoming is an inseparable part of the Federal Union, and the Constitution of the United States is the Supreme Law of the land.

GUN CONTROL ACT 18 U.S.C., 921 (a) (3)

-see appendix

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968 18 U.S.C., § 1202 9app) (c) (3)

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WYOMING STATUTE 6-11-115 1977 REPUBLISHED EDITION

(a) Any person who has previously plead guilty or been convicted of murder, voluntary manslaughter, assault to commit murder, aggravated assault, robbery, burglary, or sexual assault in the first or second decree, or mayhem, unless pardoned, and who uses or has in possession any firearm is guilty of a felony.

RULE 401, WYOMING RULES OF EVIDENCE

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

STATEMENT OF THE CASE

Petitioner was convicted of 1 Count of being a Felon in Possession of a Firearm by a Jury in the District Court of Laramie County, State of Wyoming on 29 January, 1981. After a pre-sentence report was done, Petitioner was sentenced to the Wyoming State Penitentiary. Petitioner appealed to the Wyoming Supreme Court on 17 May, 1981, from the conviction in District Court. The Wyoming supreme Court affirmed the conviction and upheld the action of the Trial Court to which error was assigned on 5 February, 1982.

The case items from an information wherein the State of Wyoming alleged that the Petitioner, who having been previausly convicted of Aggravated Assault, had a firearm in his possession.

At the Trial, during the States case-in-chief, Lt. Dale Terwilliger was called to test-

ify as to his knowledge of Petitioner's prior felony convictions. Petitioner's Trial counsel offered to stipulate to the fact that the prior convictions and objected to any testimony as to what the nature of the offense was. Trial Counsel objected on the grounds of materiatily, relevance, and it being a violation of Due Process of law pursuant to the Fourteenth Amendment of the United States Constitution. This request was denied (RA Vol III, pages 36-42).

Petitioner's Trial Counsel's objections and Motion for Mistrial was denied (R.A. Vol III, pages 36-42).

A necessary element of the offense is that the Petitioner have a prior felony. In instant case, Petitioner offered to stipulate to this element, and the stipulation was acceped and the jury was informed of the stipulation. [R.A. Vol, pages 36,37, 42]. However, the Police Officer was allowed to go ahead and testify that the Petitioner had been convicted of fireing a shot gun at the Police Officer

several years before.

The issue as to allowing the Police Officer to testify was raised on appeal and the Supreme Court of Wyoming, affirmed the Trial Judge (p D-F of Opinion).

During the States case, the State introduced the firearm in question and presented no evidence that the firearm was operable. At the end of the States' case, Peitioner's Trial counsel moved for judgment of Accquittal because the State had not proven that the firearm was operable (This motion was denied by the Trial Judge) (R.A. Vol III, pages 103-111). The motion was reiterated and again denied after the defense rested. (R.A. Vol III, pages 174-175).

At the end of the Trial, Petitioner proffered an instruction modeled after the Federal pattern instruction must be read to the Jury. (R.A. Vol. III, pages 176-178). The nature of the offered instruction was that the State must prove that the Firearm was operable, and

said Instruction was denied by the Trial Court. (R.A. Vol. III, pages 176-178).

The failure to give said Instruction was raised on appeal and denied by the Wyoming Supreme Court (Record of Opinion, pages F-H).

ARGUMENT OF GRANTING THE WRIT

THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE TESTIMONY RELATING TO THE NATURE OF PETITIONER'S PRIOR FELONY CONVICTION.

As set forth in the Statement of Case, Lt. Dale Terwilliger was allowed to testify as to Petitioner's past criminal difficulty. Petitioner's Trial Counsel and the Counsel for the STate stipulated to the fact that the Petitioner had the previous requisite felony as required by the Statute. After the Stipulation was read to the Jury, the Trial Court allowed the witness to testify as to how the Petitioner had fued a shot-gun at him in the past.

This testimony was irrelevant, immaterial, and tended to inflame the Jury, such that the Petitioners right to Due Process of Law and a Fair Trial as guaranteed under the Fourteenth amendment was denied.

The same fact situation occurred in People v Sherren, 89 Cal App 3d, 752, 152 Cal Rptr 828, ____ P2s ____ (1979). In said case, the Supreme Court said that it was error to permit testimony concerning the Defendant's prior felony when a stipulation acknowledging said felony had been entered into. The Court said that the evidence had no probative value.

The holding in Sherren has been followed in People v Hall, 167 Cal Rptr 844, 615 P2d 826, (1980) and in Sanders v State, 609, P2d 324 (Nev. 1980).

In Sanders, the Court stated in a case similar to one in instant; "the prosecution should only be allowed to prove the fact, instead of the nature of a prior conviction", where the effectiveness of the prosecutor's case is not impaired, and unnecessary and improper prejudice to the accused is avoided.

In addition, the testimony of Lt. Dale Terweilleger and wasn't relevant as defined by Rule 401 of the Wyoming Rules of Evidence.

In summary, the position of the majority of the States is that if the accused stipulates as to the fact that he has the previous requiset felony and the stipulation is agreed to, then there can be no testimony as to the previous felony. The Wyoming Supreme Court has taken a position contrary to this and allows testimony as to the previous felony and thus Petitioner respectfully requests that this Court exercise it's jurisiction over this issue

II) THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INSTRUCT THE JURY THAT A NECESSARY ELEMENT OF THE OFFENSE WAS THAT THE FIREARM BE OPERABLE.

The Statute under which the Petitioner was convicted, Section 6-11-115, of Wyoming Statutes [Cum Supp. 1981] does not define firearm. However, the Federal Statutes and Courts have defined a firearm and the Wyoming Supreme Court has taken a position completely at odds with the majority.

All laws dealing with firearms, must as a necessity start from the Second Amendment, United States Constuition, and as such Federal Law must be paramaunt in this area. The Wyoming Constuition, Article I, Section 37, respects the rule of law that the United States Constitution is the supreme rule in the land. Therefore, any Wyoming law must be in conformity with Federal law and authority.

Two different Federal gun control acts, the Gun Control Act of 1968, 18 U.S.C. § 921, et seq, and the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S. C. (App) § 1201-1203, deal with the matter firearm possession and use by conviction felons. Both acts define firearms as any weapon "which will or is designed to or may be readily be converted to expect a projectile by the action of an explosive, ... 18 U.S.C. § 921 (a) (3), 18 U.S.C. (App) 1202 (c) (3).

Federal Courts have dealt with the issue of what must be proven in order to sustain conviction under these acts. in several, reference is made to evidence that the weapon was a firearm, it had been fired, or could be fired. United States v Turner, 565 F.2d 539 (8th Cir. 1977).

United States v Samson, 533 F.2d 721 (1st Cir. 1976.

United States v. Liles, 432 F.2d 18 (9th Cir. 1978). Implicit is such findings is the concept that not only must the weapon be shown to be an operable firearm, but also the Jury must be instructed both as to what a "firearm" is and the necessity of proof on that point. See e.g. United States v. Rouse, 462 F.2d 126 (5th Cir. 1972).

Under the Federal Legistation and case law, a naked assertion that a weapon is a firearm is not sufficient; some proof as to the nature of the weapon, i.e.; has it been fired; will it fire, seem to be mandatory.

The Portion of the Wyoming Supreme Court is whether or not the firearm would fire is an affirmative defense; instead of an element of the offense, which is what the majority of Federal Courts hold. Petitioner asserts that if proof is required as to whether a firearm is operable (which seems to be the majority Federal case law); then a showing that the weapon is an operable firearm is an elemtn of the offense. If it must be operable; then the Jury must be so instructed.

Because of the Due Process and Equal Protection rights that the Fourteenth Amendment requires to be applied to all citizens of the United States. The law dealing with felons in possession must have an uniform application and definition in order for there to be and equal justice under the law.

The Wyoming Supreme Court has taken a position contrary to the Federal Courts with regard to the issue, and because such position is such a departure from the weight of authority, respecting this issue; the Petitioner resepctfully request that the Court exercise it's supervision over the issue.

CONCLUSION

This case involves a number of issues which are of great importance and substance to the field of criminal justice. These issues are such as recur after in criminal actions and are ones that have not been reached directly by the United STates Supreme Court. The two issues are ripe for a declaration by the Court. This is especially in light of the fact that more and more jurisdictions are enacting legislation dealing with firearms. Petitioner respectfully requests that this Court grant the application for a Writ of Certiorari in this matter.

TERRY CURTIS BENSON

BY

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CERTIFICATE OF SERVICE

I, Ronald G. Pretty, do hereby certify that three (3) true and correct copies of the above and foregoing were served upon the Respondant in the above-entitled action by personal delivery to the Attorney General's Office, State Capitol Building, Cheyenne, Wyoming, on the 1st day of April, 1982.

Ronald G. Pretty

RONALD G. PRETTY

Appendix

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1981

February 5, 1982

TERRY CURTIS BENSON, Appellant (Defendant),	)	
-vs-	)	No. 5538
THE STATE OF WYOMING, Appellee (plaintiff).	)	

Appeal from the District Court of Laramie County, the Honorable Alan B. Johnson, Judge.

Michael H. Schilling, Appellate Counsel, Wyoming Public Defender Program, Laramie; and Sylvia Lee Hackl, Assistant Public Defender, Wyoming Public Defender Program, Cheyenne, signed the brief on behalf of appellant. Ms. Hackl appeared in oral argument.

Steven F. Freudenthal, Attorney General; Gerald A. Stack, Deputy Attorney General, Criminal Division; and Allen C. Johnson, Senior Assistant Attorney General, signed the brief on behald of appellee. Mr. Johnson appeared

in oral argument.

Before ROSE¡ C¿J¿¡ RAPER¡ THOMAS¡ ROONEY and BROWN¡ JJ.

RAPER, J., delivered the opinion of the court.

ROSE, C.J., filed a specially concurring opinion.

RAPER, Justice.

Appellant appeals from the judgment and sentence following trial by jury at which he was found guilty of being a felon in possession of a firearm, in violation of §§ 6-11-115, W.S. 1977, Cum.Supp. 1981. 1/ His appeal raises two issues for us to ponder and decide. First, we must consider whether it was error for the trial judge to allow into evidence testimony relating to the nature of appellant's prior felony conviction. Second, we msut decide whether the trial court committed reversible error by failing to insturct the jury that an element of the offense was that the firearm be operable.

We will Affirm.

On December 8, 1980, a police officer sat in his patrol car monitoring traffic at Fifth and Pebrican near Hebard School in Cheyenne. At approximately 10:15 a.m. he saw a vehicle pass by appellant. Aware of a warrant for appellant's arrest on an outstanding municipal court complaint, the polcie officer started hi s

car and followed appellatn. After receiving radioconfirmation of the existence of the warrant, the polcie officer pulled appellant over and arrested him. 2/ Appellant was asked if he possessed any weapons, to which he indicated that he did not. The officer was aware at that time of appellant's previous conviction for taking a shot with a shotgun at another police officer and also that the complaint in municipal court recited that appellant had a gun. Appellant request permission to drive his car to his mother's nearby house before being taken in. However, the polcie officer explained that this was not possible; the car would either have to be left where it was, or the police would take custody and tow it. Appellant suddenly hurried for the car, ostensibly to lock it. The polcie officer, unsure of what appellant was trying to do, began struggling with appellant in order to keep him from reentering the car. 3/ The officer finally succeeded in his endeavor and, with the help of police back up which had arrived, handcuffed appellant.

He then patted down appellant and searched his car. Under the floor mat on the driver's side he found a .22 caliber revolver.

The Laramie County Clerk of Court identified and there was received in evidence a copy of the judgment and sentence entered on the previous conviction for aggravated assault. There was no evidence that appellant had been pardoned. At trial another police officer was called who testified concerning appellant's 1973 felony conviction for assault with a dangerous weapon. The police officer testified the conviction followed an incident in which appellant had fired a shotgun at him, to establish appellant's conviction of aggravated asault by identifying appellant as the person so convicted. Appellant tried to avoid the officer's testimony in that regard by stipulating to the felony conviction. However, the trial judge ruled the testimony admissible anyway and gave a limiting instruction as to that previous conviction.

The firearm taken from the vehicle appellant was driving and the rounds of ammunit-

ition it contained were received in evidence. No evidence was intorduced at trial by either the State or appellant to establish whether the handgun was operable. However, appellant objected to the instructions given in this case on the basis that they failed to impose upon the State the burden of proving that the firearm was operable.

I

The first question we shall address concerns the propriety of admitting testimony relating the nature of appellant's prior felony conviction where appellant was willing to stipulate that he was in fact a convicted felon. The stipulation was not offered until the police officer was on the stand and had been asked to state for what act appellant was convicted.4/ The district court allowed the stipulation that the appellant had been convicted of one of the felonies listed in §§ 6-11-115, supra fn. 1, which thus barred him from lawfully possessing a firearm. However, the district court ruled that the police officer should

be allowed to answer the question because the fact that appellant had been convicted of aggravated assault with a firearm, together with the fact that the arresting officer in this case knew that the complaint upon which the warrant was based alleged appellant had a gun, operated to show why the arresting officer acted as he did when he stopped appellant. One of appellant's positions at the trial was that the arresting officer had made an unreasonable search and seizure. An officer, with such information his possession, would be ill-advised not to take appropriate protective measures. There was a necessity under all the circumstances present to protect the officer from assault with a concealed weapon. Parkhurst v. STate, Wyo., 628 P.2d 1369 (1981); Neilson v. State, Wyo., 599 P.2d 1326 (1979); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 883, 11 L.Ed.2d 777 (1964).

As we have often said, a trial court's resolution of questions concerning the admissibility of evidence is accorded considerable

deference. so long as there is a legitimate and rational basis for it, we will not reverse on appeal. Apodaca V. State, Wyo., 627 P.2d 1023 (1981).

here, the district court's ruling that the evidence would be relevant in evaluating the arresting officer's testimony with respect to the reasonableness of the search and seizure is rational. Accordingly we cannot reverse on this basis.

II

The second question we must address concerns whether the trial court erred by failing to instruct the jury that a necessary element of offense was that the firearm be operable.5/ The statute merely talks in terms of possession of any firearm. No mention is made of an operability requirement. This court has held that a firearm need not be operable to constitute a "dangerous or deadly weapon" under §6-70B, W.S. 1957 (now § 6-4-506, W.S. 1977). Evanson v. State, Wyo., 546 P.2d 412 (1976). there a pistol jamed and would not operate. See also, Shafsky v. State, Wyo., 526 P.2d 60 (1974) where the cartridge clip was not inserted and the pistol was therefore inoperative; the con-

viction was affirmed.

States with similar statutes have held that, absent appellant's intorduction of some evidence that the firearm was inoperable, it is not error to fail to instuct the jury that operability is an essential element.

> "As to appellant's second contention that the trial court erred in failing to instruct the jury that the operability of the hand gun was an essential element of the crim, we find no error. Appellant offered no evidence indicating that the handgun was inoperable. Both officers, Shelton and Scholl, testified the gun appeared operable and that it contained live ammunition. Further, the gun as well as the clip and ammunition were admitted into evidence. It was within the judgment of the evidence. It was withing the judgment of the jury to conclude that the gun was a firearm withing the definition' of NRS 202.360. See State v. Cartwright, 246 Or. 120, 418 P.2d 822,830-831 (Or.1966), cert. denied, 386 U.S. 937, 87 S.Ct. 961, 17 L.Ed.2d 810 (1967)"Rusling v. State, Nev., 617 P.2d 1302, 1304 (1980).

For the purposese of the case before us, we see no reason to deviate from the approach followed by Nevada. Here, no evidence was intorduced showing the firearm to have been' inoperable. Further, there was evidence that

the revolver was loaded with cartridges at the time of appellant's arrest. Thus, we conclude that it was not error for the district court to rejuect an instruction requiring the jury to specifically find the firearm operable. 6/

Affirmed.

ROSE; Chief Justice, specially concurring.

I am of the opinion that the trial judge erred when he permitted the States' witness, Officer Terwilleger, to testify concerning appellant's prior conviction for aggravated assault. I will therefore concur in the result only.

The state, in it's case-in-chief, called Officer Terwilleger of the Cheyenne Police Department to the witness stand to testify about appellant's prior conviction, a necessary element of the charged offense. 1/ This witness was the same officer at whome the appellent had fired a shot in 1973. When the prosecutor adked the witness a question concerning the nature of the previous offense, but before the question was answered, defense counsel offered to stipulate to appellant's priro convict-

ion. This stipulation -- which was accepted by the prosecutor and approved by the court -- agreed that appellant's prior conviction was for a crime whcih is cincluded within the statute, and that he was the one who committed it. Even so, the trial judge permitted the prosecutor to continue to extract detailed testimony from the witness having to do with the prior offense, including the fact that it involved a shotgun being fired at him. Defense counsel persistently objected to the relevance of the testimony in light of the stipulation that had been entered into and approved by the court. The trial judge admitted the testimony on three grounds: (1) for purposes of identification; (2) for the purpose of proving the element of the crime charged; and (3) for the reason that the testimony was relevant to the probable testimony of the arresting officer.

Notwithstanding the Stipulation and the grounds upon which the trial judge admitted the evidence, the majority opinion upholds the admission of the officer's testimony on a theory that no one else had ever thought of, i.e.,

that it was relevant to a question concerning the reasonableness of the officer's arrest and seizure of the weapon. While the justification was urged by the STate in it's brief before this court, my review of the record does not disclose that the reasonableness of the search and seizure was an issue at the trial. The record reflect that the onyl time a search and seizure question came up was in a pretrial motion to suppress filed by appellant's counsel. The issue was not raised again at trial, and the instructions do not even intimate that the question was submitted to the jury. This explains why the State did not point to a reference in the transcript when the basis for upholding the admission of the testimony was asserted. It is therefore my conclusion that the majority opinion countenances the admission of the testimong through an imagined justification--one that is not reflected in the record.

In my judgment, the prosecution, upon agreeing to the proposed stipulation, was bound by it's terms and it was thereafter improper to offer proof concerning appellant's prior conviction. See: In re Friffin, 114 Cal.

Rptr. 652,29 Cal.3d 20,623 P.2d 213 (1981); State v. Duran, Utah, 522 P.2d 1374 (1974); People v. McClellan, 80 Cal.Rptr. 31,457 P.2d 871 (1969). here the prosecutor chose to accept the stipulation. AT that point there was no necessity or any further relevance for the officer's testimony concerning the prror conviction for aggravated assault. The State had stipulated to an element of the charged offense, and the trial court erred when it permitted allowing any further testimony. Ther stipulation did not recite that appellant's prior conviction had resulted becasse of the fireing of a shotgun a a police officer was irrelevant. The statute, § 6-11-115, supra, does not delineate between aggravated assault committed upon ordinary cotizens and that commited upon police officers. Sicne the stipulation covered the necessary facts to prove an element of the crim, the need for further proof ended.

Even though I am of the opinion that error was committed in admitting Officer Terwilleger's testimony into evidence, I cannot conclude that the error prejudiced the defendant in this case. The burden is on the appellant to show that

the complained-of error prejudiced him to such a degree that reversal is required. Belondon v. City of Casper, Wyo., 456 P.2d 238, cert. den., 398 U.S. 927, 90 S.Ct. 1815, 26 L.Ed.2d 89 (1969); Drummer v. State, Wyo., 366 P.2d 20 (1961). Here the jury was presented with substantial evidence proving the elements of the charged offense, which, not including the erroneous testimony, was sufficient to convict appellant. there was no question about the fact that appellant was in possession of a firearm. Under the circumstances, I cannot conclude that there was a reasonable possibility, in the absence of the error, that the verdict in the case would have been and different. Nimmo v. State, Wyo., 603 P.2d 386 (1979); Reeder v. State, Wyo., 515 P.2d 969 (1973). I therefore concur in the result reached by the majority.

1/ Section 6-11-115, W.S. 1977, Cum. Supp. 1981:

"(a) Any person who has previously pleaded guilty of been convicted of murder, voluntary manslaughter, assault to commit murder, aggravated assault, robbery, burglary or sexual assault in the first or second degree, or mayhem, unless pardoned, and who uses or has in his possession any firearm is guilty of a felony.

"(b) Upon conviction, the offender shall be punished by imprisonment in the penitentiary for not more than five (5) years."

2/ The trial judge gave an appropriate limiting instruction with respect to the outstanding warrant, and it is not an issue before us.

3/ The testimony in part relating to the arrest:

"A. It was at that time, the second time that I was advising the Defendant about the warrant,

that I remembered in the complaint that there was a mention that the Defendant did have a gun. I asked him if he had a gun and Defendant replied he did not. I advised him that incident to arrest that I would have to search him, or pat him down, anyways, and again adked him if he had a gun, and he replied to the negative.

* * * * *

"Q. Okay, What occurred then?

"A. Well, the Defendant just stood there for a moment and looked at me, and then all of a sudden he hurriedly turned and went to the open door of his car.

"Q. Would you describe the manner in which he did this? You said hurriedly'. Describe for the jury, please, just what you saw and what his actions were

that you observed.

"A. He didn't say anything. He just turned and just hurriedly--he didn't quite run, but he wasn't walking--went to his car to the open door, to the front-seat area of his vehicle.

"Q. What did you do then?

"A. I immediately followed him.

"Q. And what , if anything, did you observe the Defendant to do?

"A. He was bent over inside the open door and king of over the driver's seat. I was triying to prevent any further movement by him and was trying to pull him out of the car. He was still attempting to reach in and at one point reached back and locked the back door of the vehicle.

* * * * *

"Q. (By Mr. Smith) What else did you observe?

"A. I observed his hands moving around the seat area and floor-board area directly beneath the driver's seat.

"Q. What di you do?

"A. Well, like I stated, I at-tempted to pull him out of the car, back and forth in a tug-of-war type manner, and tried to ob-serve his hands to see what he was reaching for.

"Q. And what did you accomplish? What occurred then as you were doing that?

"A. Finally, after some time, I was able to pull him back out of the front-seat area in the front of the car."

4/ The procedure of elements for proof of a previous conviction set out in Chavez v. State, Wyo, 604 P.2d 1341 (1980) were recognized and followed by the trial court here.

5/ The appellant offered the following refused instructions purportedly taken from 18 U.S.C.

§ 921 (a) (3):

> "The term "firearm" means and included any weapon which will expel a projectile by the action of explosive."

It misrepresents that section which actually read:

> "(3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to exped a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

6/ The trial judge instructed:

> "Ther term "firearm" denotes any weapon designed to expel a projectile by action of an explosion, and includes any

handgun, rifle or shotgun."

The firearm in evidence had these characteristics.

Section 6-11-111, W.S.1977:

"(a) Rifle.--A weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive in a fixed metallic artridge to fire only a single projectile through a rifled bor for each single pull of the trigger.

"(b) Shotgun.--A weapon designed and redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger."

The trial judge apparently adopted te sense of this statute to include a handgun.

1/ As noted by the majority, appellant was convicted of a violation of §§ 6-11-115, W.S. 1977, Cumm. Supp., 1981. According to the requirements of this statute the State was obliged to prove that appellant had been convicted of one or more of the following crimes: murder, voluntary manslaughter, assault to commit murder, aggravated assault, robbery, burglary or sexual assault in the first or second degree, or mayhem. In this case the proof focused on appellant's previous conviction for aggravated assault.

APPENDIX II

18 U.S.C. 921 (a) (3)

The term "firearm" means (A) any weapon (encluding a starter gun) which will or is designed to or may readily be converted to expel a projectible by the action of an explosive; (B) the frame or reciever of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does mot include an antique firearm.

18 U.S.C. (App) 1202 (c) (3)

Firearm means any weapon (including a starter gun) which will or is designed to ro may readily be converted to expel a projectile by the action of an explosive, the fram or receiver of any such weapon, or any firearm muffler or forearm silencer; or any destructive device. Such term shall include any handgun, rifle or shopgun.